

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 16, 1999

IN RE:)	
)	
UNITED TELEPHONE SOUTHEAST, INC.,)	DOCKET NO.
TARIFF TO REFLECT PROPOSED)	98-00626
CHANGES UNDER PRICE REGULATION PLAN)	

**REPORT AND RECOMMENDATION OF THE PRE-HEARING OFFICER
FROM THE PRE-HEARING CONFERENCE HELD ON MARCH 9, 1999**

This matter came before the Tennessee Regulatory Authority ("Authority") on the above-docketed tariff filing of United Telephone Southeast, Inc. ("UTSE") to reflect proposed changes under its price regulation plan pursuant to Tenn. Code Ann. § 65-5-209.

The Authority considered UTSE's tariff filing at regularly scheduled Authority Conference held on January 19, 1999, for the purpose of appointing a Pre-Hearing Officer. Subsequent to the appointment of the Pre-Hearing Officer, Edward Phillips, a pre-hearing conference was conducted pursuant to a written notice issued on March 4, 1999. The Pre-Hearing Conference came to be held on Tuesday, March 9th.¹ The Conference was conducted for the following purposes:

¹ Pursuant to Tenn. Code Ann. § 4-5-306(c) the pre-hearing conference was conducted via telephone.

- 1) Consider all pending petitions for intervention;
- 2) Develop a statement of issues to be considered by the Directors of the Authority at a subsequent evidentiary hearing; and
- 3) Consider all other such matters as may aid in the disposition of this matter, including but not limited to the establishment of a procedural schedule.

Appearances:

The following appearances were entered by counsel at the March 9, 1999, Pre-Hearing Conference:

United Telephone-Southeast, Inc. - **James Wright, Esquire**, 14111 Capital Boulevard, Wake Forest, North Carolina 27587-5900;

BellSouth Telecommunications, Inc. - **Guy Hicks, Esquire**, 333 Commerce Street, Suite 2102, Nashville, Tennessee 37201;

Consumer Advocate Division, Office of the Attorney General - **L. Vincent Williams, Esquire and Vance Broemel, Esquire**, 426 5th Avenue, N., 2nd Floor, Nashville, Tennessee 37243;

Consideration of Pending Petitions to Intervene:

The Pre-Hearing Officer duly considered the two pending Petitions to Intervene filed by Tri-Cities Airport Authority ("Tri-Cities") and Appalachian Northeast Tennessee Resource Conservation and Development Council ("Appalachian"). These petitions were filed on November 20th, 1998. In considering these petitions, the Pre-Hearing Officer noted that the Authority had attempted to deliberate on the same at various regularly

scheduled Authority Conferences held on December 15, 1998², January 19, 1999³ and February 2, 1999⁴. At each of the aforementioned Authority Conferences, the Authority attempted to provide an opportunity for the petitioners to discuss their respective petitions. Unfortunately, neither petitioner made a noteworthy effort to appear before the Authority and pursue their request to intervene.

Pursuant to Tenn. Code Ann. § 4-5-310 and in light of the actions of the potential intervenors, it appears that neither petitioner has made an effort to demonstrate that the

² At the regularly scheduled Authority Conference held on December 15, 1998, there were no representatives present for the proposed intervenors Tri-Cities and Appalachian. Further, Mr. Wright, counsel for UTSE, informed the Directors that he had filed Objections to the pending Petitions to Intervene on December 14, 1998. Because no representatives from Tri-Cities and Appalachian appeared before the Authority concerning the pending petitions, and because UTSE filed objections to the intervention of these petitioners, the Directors agreed they would take no action on the same until Tri-Cities and Appalachian had the opportunity to respond to the objections filed herein. (See December 15, 1998 Authority Conference Transcript at pp. 47-51).

³ At a regularly scheduled Authority Conference held on January 19, 1999, Mr. Wright, stated that the parties had not reached an agreement concerning the pending interventions by Tri-Cities and Appalachian and that UTSE continued to oppose full intervention, but not limited intervention of the petitioners. Mr. George Oldham was present and appeared on behalf of Tri-Cities. Mr. Oldham explained that he was a commissioner and did not have the authority to act independent of the Tri-Cities Board. He stated that the Board would be meeting on January 21, 1999, and would decide at that time if they would pursue their interests separately from the Consumer Advocate or seek to be represented by the Advocate. Mr. Wright informed the Directors that he had attempted to contact Mr. Paul Monk in his capacity as a representative for Appalachian, however Mr. Monk had been ill and unavailable for discussion concerning Appalachian's pending request for intervention. The Directors agreed to appoint a Hearing Officer and defer consideration of the interventions until the next scheduled Authority Conference. (See January 19, 1999 Authority Conference Transcript at pp. 70-81).

⁴ At a regularly scheduled Authority Conference held on February 2, 1999, Mr. Wright indicated that UTSE representatives had met with Mr. Monk, and that Mr. Monk indicated that Appalachian's interest in this matter was the four-cent toll issue, and that Appalachian would not otherwise participate in this proceeding.

In discussing the Tri-Cities request for intervention, Mr. Wright stated that UTSE and Tri-Cities had not reached any agreement and he renewed his objection to their participation. In addition, the Consumer Advocate stated that they had not received any request from Tri-Cities seeking representation. After carefully considering the state of the pending interventions and the posture of this proceeding, the Directors approved the Hearing Officer to act on the petitions to intervene filed by both Tri-Cities and Appalachian. (See February 2, 1999 Authority Conference Transcript at pp. 48-52).

prompt conduct of this proceeding would not be impaired if such interventions were granted. Therefore, after duly considering the pending petitions to intervene, as well as the fact that the petitioning parties did not participate in the pre-hearing conference, and the fact neither petitioner has come forward to explain how their legal rights or duties may be affected in this proceeding, the Pre-Hearing Officer, has determined that the petitions should be denied.

Issues Presented for Disposition by the Authority:

Pursuant to a request from the Directors of the Authority, the Consumer Advocate and UTSE each filed a statement of the issues on December 1, 1998. As acknowledged by counsel for UTSE, UTSE's issues list was merely a statement of UTSE's positions with regard to the issues raised by the Consumer Advocate.⁵ The issues raised by the Consumer Advocate are as follows:

- 1) Whether Tenn. Code Ann. § 65-5-209[(e)] Limits the Amount of an Increase in Any One Year to the Lesser of 1/2 the Rate of Inflation or the Rate of Inflation Less 2%, or Whether a Company Can Exceed the Maximum Annual Increase by Adding Together Cumulative Increases for Past Years That May Have Been Proper But Were Not Previously Taken.⁶
- 2) Whether the Directory Advertising Revenues Should Be Included in the Aggregate Revenues Used to Evaluate Changes In Rates, or Whether Such Revenues Can Be Excluded.

⁵ See the comments of the Pre-Hearing Officer and counsel for UTSE at p. 39 of the March 9, 1999, Pre-Hearing Conference Transcript.

⁶ After much discussion at the pre-hearing conference, the pre-Hearing Officer has determined that Issue 1 as raised by the Consumer Advocate does not deal with whether the methodology is compliant with Tenn. Code Ann. § 65-5-209(e), but **whether UTSE's proposed application of the methodology to its 1998 Price Cap Adjustment accurately calculates and applies the maximum annual increase to UTSE's proposed rate change.** See the comments of the Pre-Hearing Officer and counsel for the Consumer Advocate at p. 23 of the March 9, 1999, Pre-Hearing Conference Transcript.

In addition to the issues raised in its December 1st filing, the Consumer Advocate attempted to raise a new issue concerning pay phone subsidies. Mr. Williams, on behalf of the Consumer Advocate stated the following concerning pay phone subsidies:

In 1997, the Federal Government, in the pay phone decision, stated that no state commission could go forward with any rates that are predicated upon pay phone subsidies because they are -- pay phones are deregulated and they couldn't maintain those subsidies because they affected the [sic] competition.

Despite the fact that the Consumer Advocate attempted to couch this issue as one that logically flows from Issue 1 as raised by the Advocate in its December 1, 1998, Statement of the Issues, counsel for BellSouth raised an objection to adding any new issues at this late date. In support of this objection, counsel stated that: "I don't think that the issue [Issue 1] . . . proposed [by the Consumer Advocate] includes anything about pay phones, and I think that, to the extent he later characterized it as a new issue, I think that's more accurate." In addition, counsel noted that that when the Consumer Advocate was questioned by Chairman Malone at the November 17, 1998, Authority Conference, the Advocate agreed that the only issue in this proceeding concerned the application of the methodology.⁷ After carefully considering the comments of counsel, including, but not limited to the remarks made by the Advocate at the November 17th Authority Conference and the fact that the parties to the proceeding had been required to file a

⁷ See the November 17, 1998, Authority Conference Transcript at 75.

statement of the issues by December 1, 1998, the Pre-Hearing Officer has determined that no new issues will be permitted to be raised at this stage of the proceeding.

However, before establishing the issues for this proceeding, attention must be given to the Motion to Strike Portions of the Consumer Advocate's Statement of the Issues ("Motion to Strike"). The Motion to Strike was filed by UTSE on December 10, 1998. UTSE's motion seeks to strike the commentary made by the Consumer Advocate concerning the issues it has raised therein. The Advocate's commentary delved into and explained the positions of the parties relating to the issues it has raised in this proceeding.

After careful review of UTSE's Motion to Strike and careful consideration of the response made thereto and comments of counsel, I am of the opinion that the motion is well taken and should be granted. It is not appropriate at this stage in the proceeding for the Advocate to present commentary and explanation concerning the positions of the parties relative to issues it seeks to present for resolution before the Authority. When the Directors requested that the parties file a statement of the issues, the Directors were not seeking commentary concerning the same, rather, they were seeking a clear and concise statement setting forth the issues. By granting UTSE's motion, however, the Consumer Advocate is not precluded from coming forward at the appropriate time to explain its position, rebut and refute contrary positions, and present evidence and testimony.

Given the ruling on the Motion to Strike, and also considering the limited intervention granted to the Consumer Advocate, the Advocate has presented two new

issues for resolution in this proceeding. Issue 1 is concerned with whether the application of the methodology is consistent with Tenn. Code Ann. § 65-5-209(e). This issue is not for the purpose of determining whether the methodology, in and of itself, is violative of Tenn. Code Ann. § 65-5-209. Rather, a fair reading of the same leads to the question of whether the methodology as applied to the UTSE's proposed 1998 Price Cap Adjustment will result in an increase that is not permitted under Tenn. Code Ann. § 65-5-209.

Issue 2 is concerned with whether a price-regulated company such as UTSE is required to impute directory-advertising revenues in the calculation of the proposed price cap adjustment.⁸ In accordance with the limited intervention granted to the Consumer Advocate, the proposed issues are, in fact, new issues and have not been raised in either Docket No. 96-01423 or Docket No. 97-01438. Also, since UTSE has not proposed any issues in its December 1st filing, it is the opinion of the Pre-Hearing Officer that the issues presented by the Consumer Advocate and the scope of those issues as discussed herein will be the issues for resolution before the Authority.

Resolution of Discovery Issues

During the course of discussions concerning discovery, the Consumer Advocate requested that he be permitted the opportunity to depose UTSE and BellSouth witnesses. After entertaining argument concerning the request, the Pre-Hearing Officer was of the opinion that if depositions were permitted, the proceeding may become unnecessarily protracted, therefore, the Pre-Hearing Officer determined that depositions would not be

permitted. However, in an effort to afford discovery, the Pre-Hearing Officer concluded that the Advocate should be permitted the opportunity to pose ten (10) data requests (interrogatories) including sub-parts, and ten (10) requests for admissions or denials to BellSouth, in addition to the discovery requests already made of UTSE.⁹ If the Consumer Advocate determines that the amount of discovery being permitted is not sufficient, then the Consumer Advocate upon a showing of good cause may petition the Pre-Hearing Officer for leave to request further discovery.

The discovery being permitted herein is limited to the two issues presented for resolution thus, any discovery related to BellSouth's price regulation plan will not be permitted. This proceeding is strictly for the purpose of dealing with UTSE's 1998 price cap adjustment.¹⁰

In addition to resolving the pending discovery issues, the Pre-Hearing Officer established the following schedule for discovery:

- 1) Consumer Advocate will file its discovery on BellSouth by 12:00 p.m., March 15, 1999.
- 2) UTSE will file its responses to outstanding discovery requests by 4:30 p.m., March 24, 1999.

⁸ The Consumer Advocate's proposed issues are set forth in greater detail at p. 4 of this Report.

⁹ The Consumer Advocate also raised the issue of its outstanding discovery requests propounded to UTSE, after discussion and consideration of the parties comments, it was determined that UTSE would be permitted to file its responses to the Advocate's discovery by 4:30 p.m. on March 24, 1999.

¹⁰ The Consumer Advocate may pose discovery questions related to the perception and beliefs of the parties as to the stipulated methodology. Thus, the Consumer Advocate is free to seek discovery of BellSouth with regard to what BellSouth believed the stipulation meant in terms of the application of the methodology.

- 3) BellSouth will file its discovery responses by 4:30 p.m., on March 24, 1999.¹¹

Resolution of Request for Official Notice

On December 10, 1999, UTSE filed a request for the Authority to take judicial notice of a number of documents contained in the official records of the Authority. Counsel for UTSE requested that the Pre-Hearing Officer entertain that request in the confines of the pre-hearing conference.¹² The Pre-Hearing Officer determined that under the grant of authority by the Directors, it was appropriate to consider UTSE's request.

In its request, UTSE desired that official notice be taken of the following Authority records:

- 1) Initial Order of Hearing Officer dated January 27, 1997 in Docket No. 96-01423 (UTSE's 1996 Price Cap Filing);
- 2) Stipulation regarding Price Cap Methodology dated January 23, 1997; filed in Docket 96-01423 January 27;
- 3) TRA Order dated September 4, 1997 in docket No. 96-01423;
- 4) Transcript of June 30, 1998 Directors conference in Docket No. 97-01438 (UTSE's 1997 Price Cap Filing); and
- 5) Transcript of November 17, 1998 Directors conference in Docket No. 98-00626 (UTSE's 1998 Price Cap Filing)

Prior to rendering a decision on the request, the Pre-Hearing Officer determined that the

¹¹ By letter dated March 19, 1999, counsel for BellSouth notified the parties and the Pre-Hearing Officer that the Consumer Advocate had inadvertently served the discovery requests intended for BellSouth on UTSE, and that as a result, BellSouth would file its response to the same by March 31, 1999. In light of this situation, the Pre-Hearing Officer has determined that it is acceptable for BellSouth to file its response by March 31, 1999.

¹² UTSE filed this request pursuant to Tenn. Code Ann. § 4-5-313(6).

Consumer Advocate should be permitted to respond to the same, and requested that the Advocate do so no later than 4:30 p.m., March 24, 1999. Thereafter, the Pre-Hearing Officer committed to review the request and the response thereto and render a recommendation concerning UTSE's request herein.

After carefully considering the request of UTSE, the response of Consumer Advocate and the current status of this matter, as well as the requirements of Tenn. Code Ann. § 4-5-313(6), the Pre-Hearing Officer is of the opinion that the request is premature. Therefore, the Pre-Hearing Officer recommends the Directors of the Authority deny the request without prejudice.

Procedural Schedule

The last focus of the pre-hearing conference was to establish a procedural schedule. The following schedule was a result of discussions with the parties:

- 1) Direct Testimony to be filed by 4:30 p.m., April 14, 1999.
- 2) Rebuttal Testimony to be filed by 4:30 p.m., April 21, 1999.

Subsequent to the adjournment of the pre-hearing conference, UTSE filed an Agreed Motion for Extension of Time to Pre-file Testimony on April 7, 1999. After contacting the other parties in this case, UTSE and those parties were in accord that pre-filed direct testimony should be due two (2) weeks following the issuance of the Pre-Hearing Officer's Report regarding the March 9, 1999, pre-hearing conference with pre-filed rebuttal due one (1) week thereafter.

With the filing of the Pre-Hearing Officers Report being April 16, 1999, and in light of the Agreed Motion, the Pre-Hearing Officer has determined that the procedural schedule should be amended consistent with the request of the parties herein. In addition, given the delay created by the filing of this report, the Pre-Hearing Officer has determined that it would be appropriate to set a hearing date for this matter. Thus, the amended procedural schedule is as follows:

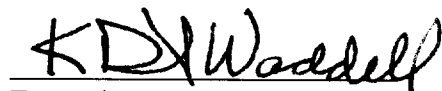
- 1) Direct Testimony due by 4:30 p.m., April 30, 1999.
- 2) Rebuttal Testimony due by 4:30 p.m., May 7, 1999.
- 3) Hearing on the merits to be held before the Directors of the Authority at 9:00 a.m., on May 13, 1999.

The Pre-Hearing Officer respectfully requests that the Directors of the Authority approve the Report and Recommendation as filed for the reasons set forth herein.

Respectfully submitted,


Edward Phillips, as Pre-Hearing Officer

ATTEST:


Executive Secretary